

EXHIBIT NO.

3

Page: C1

DATE

3.11.13

BILL NO.

HB 310

Publication: Bozeman Daily Chronicle; Date: Feb 26, 2012; Section: The Big Sky

**Gardiner couple sues medical providers in wrongful birth case**  
By JODI HAUSEN Chronicle Staff Writer

A Gardiner couple have filed a lawsuit in Gallatin County District Court against several healthcare providers, claiming they would have terminated a pregnancy if they had known their child would be born with cystic fibrosis.

In the suit filed in October, Kerrie and Joe Evans claim they have suffered emotional distress and will be burdened with healthcare costs associated with caring for their child who was born with the fatal disease.

"This is a case about how several healthcare providers failed to deliver the most basic care and test for cystic fibrosis, resulting in the Evans' child being born with this incurable, painful, costly and fatal disease," attorneys Casey Magan and Russ Waddell wrote in the complaint.

But healthcare providers claim there is no precedent for a "wrongful birth" lawsuit in Montana and that the issue raises complex political and moral questions that lawmakers should address, not the court system. They want the lawsuit dismissed.

If the court accepts the case, parents could make several claims in hindsight that they would have aborted their child had they known of genetic defects, defense attorney Julie Lichte wrote in court documents.

"In an age where prenatal testing can identify genetic indicators for traits ranging from Down Syndrome to eye color, will the court allow parents to sue for a lost right to abort any child the parent subjectively considers 'imperfect' ... Where do we draw the line?" Lichte wrote.

The couple are suing Livingston nurse Peggy HealthCare Scanson, , Bozeman OB/GYN, Dr. William Peters, Bozeman Deaconess Health Services and Shodair Children's Hospital Department of Medical Genetics for an amount to be determined by a jury.

They claim Scanson failed to properly inform the couple of simple blood tests they could have taken to determine if they are carriers of the recessive gene that, if positive, would give their child a 25 percent chance of having cystic fibrosis.

Also, risky genetic testing that Kerrie Evans underwent in the first trimester of pregnancy determined the baby did not have chromosomal abnormalities, the suit states. But that same test could also have told the couple if the fetus would have the debilitating disease, and that analysis was never done.

Evans, who was 38 when she became pregnant, told Scanson "that she and her husband, Joe, had already had the most private of discussions about terminating the pregnancy in the event the fetus tested positive for serious fetal abnormalities," the lawsuit states.

The couple received a report indicating their baby was normal, the suit claims. But had the tissue been tested for cystic fibrosis, it would have tested positive for the disorder.

"In fact, the Evans' fetus was not 'normal,' but had cystic fibrosis," the lawsuit states. "The Evans, previously excited about the prospects of raising a normal, healthy child, were prepared neither emotionally nor financially to raise and care for a child with cystic fibrosis."

But Scanson contends she educated Kerrie Evans about available tests and that the couple did not request them.

"Apparently, Mrs. Evans did not read the ... brochures provided to her," Lichte argued. The genetic testing procedure "was ordered because of Mrs. Evans' 'maternal age,' not a finding of cystic fibrosis-carrier status in the parents."

Despite her medical issues, Baby Evans, as she is referred to in court documents, suffers no other impairment, defendants argue.

"In all likelihood, she will walk, talk, think independently, attend school, make friends and share a bond with her parents," they say. "Nonetheless, plaintiffs now claim, that had they discovered during their pregnancy that Baby Evans would be born with cystic fibrosis, they would have aborted her."

Jodi Hausen can be reached at [jhausen@dailychronicle.com](mailto:jhausen@dailychronicle.com) or 582-2630.



## **Judge allows negligent birth lawsuit to go forward**

By JODI HAUSEN Chronicle Staff Writer

A Gardiner couple who say they would have terminated a pregnancy had they known their daughter would have a debilitating and fatal disease can move forward with their lawsuit against healthcare providers, a Gallatin County District Court judge decided.

On Monday, District Judge Mike Salvagni ruled that Kerrie and Joe Evans' claims should be heard in court. The couple say healthcare providers harmed them by failing to conduct genetic testing to determine if their child would have cystic fibrosis.

The lawsuit, filed in October, states the Evanses have suffered emotional distress and will be burdened with healthcare costs associated with caring for their daughter with the incurable respiratory disease.

Named in the suit are Livingston HealthCare, nurse Peggy Scanson, Dr. William Peters, Bozeman OB/GYN, Bozeman Deaconess Hospital and Shodair Children's Hospital.

The lawsuit states Kerrie Evans, who was 38 when she became pregnant, told Scanson she and her husband had had "the most private of discussions about terminating the pregnancy in the event the fetus tested positive for serious fetal abnormalities."

The Evanses allege Scanson failed to inform the couple of simple blood tests they could have taken to determine if they carried the recessive gene that would give their unborn child a 25 percent chance of having the disease.

Additionally, Kerrie Evans underwent risky genetic testing during the first trimester of her pregnancy that determined the baby did not have chromosomal abnormalities. That same test could have told whether the fetus would have cystic fibrosis, but that analysis was not performed.

Defendants asked Salvagni to dismiss the case calling it a "wrongful birth" lawsuit, which has no precedent in Montana law. They argued the complex and moral issue is better suited for legislators to hash out.

The Evanses are seeking damages "for a missed opportunity to abort their daughter," Scanson's and Livingston HealthCare's attorney Julie Lichte wrote. Allowing the case to proceed "will ask the jury to award them damages for the very existence of their daughter."

"The moral, emotional and political implications of this claim are undeniably great," Lichte also wrote.

Salvagni clearly rejected that argument.

"The court need not defer to the Legislature and **NEED NOT UTILIZE THE MISLEADING AND INFLAMMATORY 'WRONGFUL BIRTH' LABEL**," he wrote, in capital letters, bolded and underlined. "The 'wrongful birth' label is not instructive as any 'wrongfulness' lies not in the birth but in the negligence of the physician."

The judge also was not persuaded by Lichte's contentions that allowing the case to go forward would "leave the door open for a wide range of claims by parents who allege, with the benefit of hindsight, that they would have aborted their child had they known he or she would suffer from a genetic 'defect'" like diabetes or hemophilia.

Salvagni doubted the lawsuit would provoke a flood of other similar cases.

Few parents would be willing to publically acknowledge their "desire for an abortion after the child's birth," he wrote.

Lichte also contended her clients actions did not cause damage to the Evanses.

"Cystic fibrosis is an incurable, genetic disease that is inherited at the time of conception," she argued. "Neither (Livingston HealthCare) nor Scanson caused Baby Evans to contract cystic fibrosis and neither could have prevented this disease" before birth.

But the couple's attorneys, Casey Magan and Russ Waddell, said the case is similar to a misdiagnosed patient with cancer resulting in damages from the patient's decreased opportunity to fight the disease, increased pain and suffering.

Both cases amount to negligence, they argued, and Salvagni agreed.

The case is about "Kerrie's lost right to make an informed, intelligent decision about whether or not to terminate her pregnancy," he wrote. Ruling otherwise would "immunize from liability those in the medical field providing guidance to persons who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic (or other) defects."